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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**DEVELOPERS SURETY AND
INDEMNITY COMPANY,**

**Cross-Complainant and
Appellant,**

v.

INDYMAC VENTURES, LLC,

Cross-Defendant and Respondent.

**A132229, A132231,
A132232, A132268**

**(Contra Costa County Super. Ct.
Nos. C09-00538, C09-00672,
C09-00786 & C09-01535)**

In each of the four cases involved in this consolidated appeal,¹ the trial court entered judgment in favor of respondent IndyMac Ventures, LLC (IndyMac), after it sustained IndyMac's demurrers to a cross-complaint filed by appellant Developers Surety and Indemnity Company (Developers). On appeal, Developers contends that in each action it should be permitted to amend one of its causes of action for declaratory relief and the cause of action for an accounting should be reinstated. We agree.

¹ On August 19, 2011, this court consolidated the appeals in A132229, A132231, A132232, and A132268 for the purposes of briefing, oral argument, and decision.

BACKGROUND²

The actions at issue in this appeal arise out of the construction of a residential development known as the “Palmilla” development, located in the City of Brentwood, California (the Project). The four original complaints were filed by subcontractors who claim they were not fully paid by the general contractor. The subcontractors seek to recover against the general contractor for breach of contract. They also seek to recover against Developers on bonds that Developers issued guaranteeing payment for work on the Project. The subcontractors also seek to foreclose mechanic’s liens.

In each of the subcontractor actions, Developers filed substantially identical cross-complaints against IndyMac, the construction lender for the Project, asserting two causes of action for declaratory relief and one cause of action for an accounting. Developers alleged that PBP Limited Partnership was the developer of the Project pursuant to a subdivision improvement agreement with the City of Brentwood. “IndyMac Bank” was the original construction lender for the Project, and IndyMac is the successor-in-interest to IndyMac Bank and the beneficiary under a deed of trust on the Project. Developers issued bonds for the Project, guaranteeing completion of “Subdivision Improvements” and payments to labor and materials suppliers.

Developers alleged it entered into an agreement (Set Aside Agreement) with IndyMac, whereby IndyMac agreed to set aside certain funds from the construction loan to be used for the Subdivision Improvements. IndyMac breached the Set Aside Agreement by failing to disburse the set aside funds. In its second cause of action, for declaratory relief,³ Developers alleged that IndyMac breached the Set Aside Agreement

² In this appeal from a judgment following the trial court’s orders sustaining IndyMac’s demurrers, this court is obligated to “ ‘treat the demurrer as admitting all material facts which were properly pleaded.’ ” (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166 (*Total Call*)). Our factual summary reflects this standard of review. (See *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1056, fn. 1.)

³ Developers’ first cause of action, also for declaratory relief, is not at issue on appeal. Developers does not contend the trial court erred in sustaining IndyMac’s demurrer without leave to amend as to the first cause of action.

and sought a judicial declaration that, as a result, if Developers paid the plaintiff subcontractor's bond claim, Developers would be subrogated to the plaintiff's mechanic's lien rights and the mechanic's lien would have priority over IndyMac's deed of trust. In its third cause of action, Developers sought an accounting of funds disbursed under the Set Aside Agreement.

IndyMac demurred to the first and second causes of action in each of Developers' cross-complaints. IndyMac demurred to the second cause of action on the ground that the claim sought an advisory opinion as to what would happen *if* Developers paid the plaintiff's bond claim. The trial court sustained the demurrer without leave to amend. The court's order stated that the declaratory relief causes of action "do not state an 'actual present controversy' " because "Developers has alleged only potential or hypothetical disputes." Subsequently, IndyMac demurred to Developers' third cause of action for an accounting. IndyMac contended the claim was moot due to dismissal of the declaratory relief causes of action; the declaratory relief claims had sought a declaration that IndyMac was required to pay undisbursed loan funds, while the third cause of action sought to determine the amount that should be paid. The trial court sustained the demurrer without leave to amend.⁴

In March 2011, the trial court entered a judgment on the cross-complaint in favor of IndyMac in each of the four actions involved in this consolidated appeal. The appeals involved herein followed.

DISCUSSION

A trial court's order sustaining a demurrer is reviewed de novo to determine whether the complaint states a cause of action. (*Total Call, supra*, 181 Cal.App.4th at p. 166.) Although the reviewing court determines de novo whether the complaint states a cause of action, the trial court's decision whether to sustain the demurrer with leave to amend is reviewed for abuse of discretion. "The sustaining of a demurrer without leave

⁴ The record on appeal does not contain the demurrers and associated orders in all of the underlying actions; the parties do not identify any relevant differences in the procedural history of any of the actions.

to amend is an abuse of discretion if there is a reasonable possibility that the defect could be cured by amendment.” (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 861 (*Las Lomas*), citing *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

“ ‘[I]f a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action. [Citation.]’ [Citation.]” (*Total Call, supra*, 181 Cal.App.4th at p. 166.) “[T]he burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. [Citation.] ‘To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action.’ [Citation.]” (*Ibid.*) “The failure to request leave to amend in the trial court ordinarily does not prevent a plaintiff from making such a request for the first time on appeal. [Citations.]” (*Las Lomas, supra*, 177 Cal.App.4th at p. 861.) “When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.” (Code Civ. Proc., § 472c, subd. (a).)

On appeal, Developers requests leave to amend its cross-complaints to state its second cause of action for declaratory relief as an indemnity claim. “Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred. [Citations.]” (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 (*Rossmoor*); accord, *Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1023.) “This obligation may be expressly provided for by contract [citation], it may be implied from a contract not specifically mentioning indemnity [citation], or it may arise from the equities of particular circumstances [citations].” (*Rossmoor*, at p. 628.) “An indemnity claim effectively seeks to apportion among the parties to the indemnity action the precise liability claimed by the plaintiff in the main action” (*Time for Living, Inc. v. Guy Hatfield Homes/All American Development Co.* (1991) 230 Cal.App.3d 30, 39 (*Time for Living*).) Developers contends, if it is found liable to the

plaintiffs on its bonds, then it has the right to be indemnified by IndyMac, based on IndyMac's breach of the Set Aside Agreement. This is a standard indemnity claim.

It is well established that a defendant that has not yet sustained a loss may file a cross-complaint, including one for declaratory relief, alleging it is entitled to recover from a third party if it is adjudged liable to the plaintiff. (See Code Civ. Proc., §§ 428.10, subd. (b), 428.70, subd. (a)(1) [defendant may file cross-complaint against a new party, claiming the right to recover amounts "for which he may be held liable" on the original complaint]; see also *People ex rel. Dept. of Transportation v. Superior Court* (1980) 26 Cal.3d 744, 758-759 [a defendant may file a declaratory relief cross-complaint for indemnity before sustaining loss].) For example, in *Roylance v. Doelger* (1962) 57 Cal.2d 255, 262, the defendant insurer filed a cross-complaint against third parties who it alleged "were the real tortfeasors ultimately liable to the injured persons." The California Supreme Court approved of the cross-complaint, which "prayed for a declaration of the rights of the parties and that the court 'declare that if plaintiff' recovers from defendant that defendant then 'have judgment over in like amount against cross-defendants.' " (*Id.* at p. 258; accord, *Time for Living, supra*, 230 Cal.App.3d at pp. 38-39.) Similarly, in *Liberty Mut. Ins. Co. v. Harris, Kerr, Forster & Co.* (1970) 10 Cal.App.3d 1100, 1102-1103 (*Liberty*), an insured sustained a loss due to the dishonesty of an employee, and then sued its two insurers, both of which had refused to pay the insured for the loss. (*Id.* at pp. 1101-1102.) The insurers filed cross-complaints against the insured's accountants, "seeking declaratory relief in the form of a judgment that if the insurer is liable to the insured, the accountants are liable to the insurer." (*Id.* at p. 1102.) After the trial court sustained demurrers to the cross-complaints, the appellate court reversed, relying on *Roylance* and other cases and ruling the cross-complaints for declaratory relief were proper even though the insurers had made no payments to their insured. (*Liberty*, at pp. 1102-1104.)

Because "the courts of California have now definitely agreed upon the rule that a defendant may, by cross-complaint for a declaration of the rights of the parties, bring in a party from whom he claims indemnity in case he be held liable in the principal action"

(*Dreybus v. Bayless Rents* (1963) 213 Cal.App.2d 506, 508), Developers should be granted leave to amend its cross-complaints to assert its second cause of action for declaratory relief as an indemnity claim under the Set Aside Agreement. Because the third cause of action for an accounting seeks to determine the amount allegedly due under the Set Aside Agreement, that cause of action also should be reinstated.⁵

DISPOSITION

The judgments in the superior court actions at issue in this appeal are reversed. On remand, the trial court is directed to grant Developers leave to amend the second and third causes of action in its cross-complaint in each of the actions. The trial court's orders dismissing the first cause of action in Developers' cross-complaints are affirmed. Costs on appeal are awarded to Developers.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

⁵ IndyMac's contention that the third cause of action fails to state a claim is entirely based on its argument that the accounting claim is "ancillary to and dependant upon" the declaratory relief claim and, therefore, must fall with the declaratory relief claim. Because the declaratory relief cause of action may be amended to state a claim, the asserted basis for dismissing the accounting cause of action no longer exists.